

NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

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JEFFREY JEROME SALINAS  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED

- I. Whether the Fifth Circuit's unsupported treatment of Petitioner's prior drug possession conviction as a "controlled substance" offense "so far departed from the accepted and usual course of judicial proceedings," Sup. Ct. R. 10(a), as to require this Court to vacate the judgment of the lower court and remand for further proceedings.
- II. For purposes of the third prong of plain-error review under Fed. R. Crim. P. 52(b), is the plain error of treating the Federal Sentencing Guidelines as mandatory (in contravention of this Court's decision in United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005)) a **structural** error that necessarily affects a defendant's substantial rights?
- (SUBSIDIARY QUESTION: Should this Court hold this case pending this Court's resolution of a similar question in Washington v. Recuenco, No. 05-83, cert. granted, 126 S. Ct. 478 (2005)?)
- III. Even if this type of Booker error is not structural, has the Fifth Circuit nevertheless misapplied this Court's decision in United States v. Dominguez Benitez, 542 U.S. 74 (2004), by requiring more than a "reasonable probability" that this error affected a defendant's sentence?
- IV. Should this Court grant certiorari to resolve the deep, three-way circuit split respecting the proper application of the plain-error rule to unpreserved Booker error?

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PRAYER

The petitioner, JEFFREY JEROME SALINAS, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on August 8, 2005.

OPINIONS BELOW

On August 8, 2005, the United States Court of Appeals for the Fifth Circuit issued its decision in United States v. Salinas, No. 04-20574 (5th Cir. Aug. 8, 2004) (unpublished although reported at 142 Fed. Appx. 830). A copy of the court's opinion is attached as Appendix A. On October 4, 2005, the Fifth Circuit denied Mr. Salinas's petitions for rehearing and for rehearing en banc. A copy of this order is attached as Appendix B.

A copy of the district court's judgment and sentence is attached as Appendix C. The district court did not otherwise issue a written order or opinion on the issues raised herein.

JURISDICTION

On October 4, 2005, the United States Court of Appeals for the Fifth Circuit entered its opinion on rehearing, denying Mr. Salinas's petitions.

Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The first question presented implicates 18 U.S.C. § 3553(a), which provides in relevant part:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court in determining the particular sentence to be imposed, shall consider - . . .

(4) the kinds of sentence and the sentencing range established for -

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines -

(I) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress . . . .

The second through fourth questions presented implicate the Fifth Amendment to the United States Constitution, which provides, in pertinent part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. V.

They also involve the Sixth Amendment to the United States Constitution, which provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and the cause of the accusation;  
. . . .

U.S. Const. amend. VI.

Also at issue in these questions is the federal plain-error rule, which provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b).

STATEMENT OF THE CASE

A. Course of Proceedings

On January 8, 2004, a federal grand jury in the Houston Division of the Southern District of Texas returned a two-count indictment against Jeffrey Jerome Salinas. The first count alleged that, on or about December 5, 2003, he had taken \$1,493 "by force and violence and by intimidation" from a federally insured Klein Bank in violation of 18 U.S.C. § 2113(a). 1 R. 21. The second count alleged that, on or about December 12, 2003, Mr. Salinas had "by force and violence and by intimidation" taken \$890 from a federally insured Washington Mutual Bank in violation of 18 U.S.C. § 2113(a). 1 R. 20.

On March 8, 2004, Mr. Salinas pleaded guilty to both counts of the indictment in district court. 2 R. 7-9. Thereafter, on June 21, 2004, the district court sentenced Mr. Salinas to 120 months' imprisonment and three years of supervised release. 3 R. 8. In addition, the district court ordered Mr. Salinas to pay \$2,383 of restitution, as well as a \$200 mandatory assessment. 1 R. 64-69; 3 R. 8.

Mr. Salinas timely filed notice of appeal on July 1, 2004. 1 R. 73-74. On August 8, 2005, the United States Court of Appeals for the Fifth Circuit issued an opinion affirming the judgment of the district court. See Appendix A. On October 4, 2005, the Fifth Circuit denied Mr. Salinas's petitions for rehearing and rehearing en banc. See Appendix B.

B. Statement of Facts

On January 8, 2004, a United States Grand Jury in the Southern District of Texas, Houston Division, returned a two-count indictment against Jeffrey Jerome Salinas. The two counts charged Mr. Salinas with committing bank robberies in violation of 18 U.S.C. § 2113(a) on December 5, 2003, and December 12, 2003, respectively. 1 R. 20-21.

On March 8, 2004, Mr. Salinas appeared with counsel in the United States District Court for the Southern District of Texas and pleaded guilty to both counts of the indictment. 2 R. 5, 9. There was no plea agreement. The district court accepted the plea and ordered preparation of a PSR. 1 R. 56; 2 R. 9.

The probation office used the 2003 version of the United States Sentencing Commission, Guidelines Manual ("USSG") to calculate a sentencing range for Mr. Salinas. PSR ¶ 21. The PSR first calculated the offense level applicable to each count, assigning twenty-two offense levels to the first count, PSR ¶ 27, but twenty-four to the second based on the conclusion that this robbery had involved a threat of death, PSR ¶¶ 30, 34. Pursuant to USSG § 3D1.4, the PSR grouped counts one and two together for a combined offense level of twenty-six. PSR ¶ 40. The PSR also determined that the offense level should be reduced by three levels because of Mr. Salinas's acceptance of responsibility. PSR ¶ 41.

The PSR ultimately disregarded these calculations, however, because it concluded that Mr. Salinas should be sentenced as a career offender pursuant to USSG § 4B1.1 because the instant

convictions were for robbery and because he had two previous robbery convictions. PSR ¶ 43. According to the PSR, the two previous robberies had been committed less than an hour apart in the early morning of August 25, 1996. PSR ¶¶ 47, 48. Mr. Salinas had pleaded guilty to each of these robbery charges on October 6, 1997 in the same court of the State of Texas, and was released from custody on the same day for each. PSR ¶¶ 47, 48. Concluding on the basis of these prior Texas convictions that Mr. Salinas should be sentenced as a career offender, the PSR found that, including a reduction for acceptance of responsibility, Mr. Salinas should be assigned a total offense level of twenty-six. PSR ¶ 45.

Because it had found that Mr. Salinas was a career offender, the PSR assigned him a criminal history category of VI. PSR ¶ 51. Based on an offense level of twenty-six and a criminal history category of VI, the PSR concluded that the Guidelines provided for a term of imprisonment between 120 to 150 months. PSR ¶ 72. Mr. Salinas's trial counsel made no objections to any of the PSR's calculations, 1 R. 60-61; 3 R. 2-3, and the district court sentenced Mr. Salinas within this range to 120 months' imprisonment. 3 R. 8. When pronouncing sentence, the district court expressed discomfort with the laws which limited its sentencing discretion: "I don't want to send you to prison now. But the choices you have made and the choices Congress has made compel this result." 3 R. 9.

On appeal, Mr. Salinas argued that the district court had committed plain error by failing to treat his two prior Texas

convictions for robbery as related offenses within the meaning of USSG §§ 4A1.1(f), 4A1.2, comment. (n.3), and 4B1.2(c). Appellant's Br. at 12-25. Had the Court found these convictions were related pursuant to USSG § 4A1.2(a)(2), the applicable Guidelines range would have been substantially less - his total offense level would have been twenty-three, PSR ¶ 43, and his criminal history would have been IV, instead of VI.<sup>1</sup> Thus, in these circumstances, Mr. Salinas's sentencing range would have been seventy to eighty-seven months. USSG Ch.5, Pt.A, Sentencing Table (intersection of total offense level of twenty-three and criminal history category of IV). Mr. Salinas also raised a claim of ineffective assistance of counsel based on his trial lawyer's failure to raise this objection in district court. Appellant's Br. at 26-30.

The Fifth Circuit rejected both these claims because it found that Mr. Salinas would be unable to show that he was prejudiced by any error in the district court. The Court made this finding based on its conclusion that, even if Mr. Salinas's two robbery convictions had been treated as related, he would still have been eligible for a career offender enhancement because he had a prior conviction for simple possession of a controlled substance, and this conviction qualified as conviction for a "controlled

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<sup>1</sup> In the absence of the career offender designation, the PSR found that Mr. Salinas had eleven criminal history points. PSR ¶ 51. However, if the two Texas robberies were related, then each offense would not have received three criminal history points. USSG § 4A1.2(a)(2). Instead, the second offense would have been awarded only a single point. USSG § 4A1.1(f). Thus, Mr. Salinas would have received a total of nine criminal history points, placing him in criminal history category IV.

substance" offense for purposes of the career offender enhancement. See Appendix A at 34-35. The offense to which the Fifth Circuit appears to refer is a 1991 Texas conviction for "possession of a controlled substance." PSR ¶ 46.

Mr. Salinas also argued on appeal that the district court had committed reversible plain error by sentencing him pursuant to a mandatory guidelines regime in violation of this Court's decision in United States v. Booker. Although the Fifth Circuit concluded that the district court had committed an error which was plain, it found that Mr. Salinas could not show that the error had affected his substantial rights. See Appendix A at 36-37.

BASIS OF FEDERAL JURISDICTION IN THE  
UNITED STATES DISTRICT COURT

This case was brought as a federal criminal prosecution under  
18 U.S.C. 2113(a).

REASONS FOR GRANTING THE WRIT

- I. This Court should grant certiorari in order to remedy the Fifth Circuit's serious departure from "the acceptable and usual course of judicial proceedings," Sup. Ct. R. 10(a).

In rejecting Mr. Salinas's appeal of his sentence, the court of appeals concluded that a prior Texas conviction for simple possession of a controlled substance qualified as a "controlled substance offense" within the meaning of USSG §§ 4B1.1 and 4B1.2(a).<sup>2</sup> Because this conclusion is contrary to the plain language of the guidelines, the Fifth Circuit's binding precedent, and the consistent holdings of the other courts of appeals, this Court should grant a writ of certiorari to correct this serious departure from "the acceptable and usual course of judicial proceedings," Sup. Ct. R. 10(a).

The Fifth Circuit's conclusion is contrary to the plain language of the Guidelines. For purposes of the career offender enhancement, the Guidelines plainly state that

[t]he term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the **possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.**

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<sup>2</sup> The government has never suggested this rationale as a basis for affirming the sentence of Mr. Salinas. In addition, the probation office did not suggest that this prior conviction could serve as a predicate offense for application of the career offender sentencing enhancement. PSR ¶ 43.

USSG § 4B1.2(b) (entitled "Definitions of Terms Used in Section 4B1.1") (emphasis added). According to the Pre-Sentence Investigation Report ("PSR"), Mr. Salinas's prior conviction was for "possession of a controlled substance." PSR ¶ 46. Indeed, the court of appeals appears to have recognized that he had been convicted of simple possession. See Appendix A at 35 (noting that "Salinas also pleaded guilty to felony possession of a controlled substance"). Because simple possession is not included within the definition of "controlled substance offense" set forth at USSG § 4B1.2(b), the Fifth Circuit seriously erred when it rejected Mr. Salinas's arguments on appeal on this basis.

Not only was the Fifth Circuit's holding contrary to the plain language of the Guidelines, it was contrary to the its own precedent. See United States v. Gaitan, 954 F.2d 1005, 1010-11 (5th Cir. 1992) (holding conviction for simple possession of drugs cannot serve as a predicate offense for a career offender enhancement). Likewise, each and every court of appeals that has addressed this issue has easily concluded that a drug possession offense is not a "controlled substance" offense for purposes of the career offender guideline. See United States v. Jiminian, 14 F.3d 45, 1994 WL 14838, at \*1 n.1 (1st Cir. 1994) (unpublished); United States v. Pearson, 77 F.3d 675, 676 (2d Cir. 1996); United States v. Hernandez, 218 F.3d 272, 278 (3d Cir. 2000); United States v. Neal, 27 F.3d 90, 92 (4th Cir. 1994); United States v. Franks, 998 Fed. Appx. 483, 487-88 (6th Cir. 2004) (unpublished); United States v. Atkinson, 979 F.2d 1219, 1222-23 (7th Cir. 1992);

United States v. Baker, 16 F.3d 854, 856 (8th Cir. 1994); United States v. Foster, 28 F.3d 109, 1994 WL 201201, at \*1 (9th Cir. 1994) (unpublished); United States v. Kissick, 69 F.3d 1048, 1056 (10th Cir. 1995); see also United States v. Adkins, 961 F.2d 173, 174 (11th Cir. 1992) (accepting government concession that conviction for simple possession was not a predicate "controlled substance" offense).

This Court has previously intervened when a court of appeals has reached a conclusion without any legal support. For example, in Kyles v. United States, 504 U.S. 980 (1992), the Court summarily vacated a judgment of the Fifth Circuit with instructions that, upon remand, the Fifth Circuit correctly apply its own precedent. Id. (remanding "for further consideration in light of United States v. Shano, 955 F.2d 291 (5th Cir. 1992)"). Likewise, in Price v. United States, 577 U.S. 1152 (5th Cir. 2003), this Court vacated a decision of the Fifth Circuit when the Solicitor General conceded that the court of appeals had "erred in concluding that [a prior] drug possession offense qualified as a predicate felony."

As in Kyles and Price, the Fifth Circuit plainly erred, and its judgment is far outside the usual and acceptable course of judicial proceedings. See Sup. Ct. R. 10(a). Moreover, the Fifth Circuit's error has substantially affected Mr. Salinas, by providing the basis for the Fifth Circuit's decision to affirm the application of a career offender enhancement against him. Under these circumstances, Mr. Salinas respectfully requests that this Court summarily vacate the decision of the Fifth Circuit and remand

for further proceedings. See, e.g., Bradshaw v. Richey, 126 S. Ct. 602 (2005); Kaupp v. Texas, 538 U.S. 626 (2003).

II. In applying the third prong of plain-error review under Fed. R. Crim. P. 52(b) – namely, whether an error has affected the defendant’s substantial rights – to the error of treating the Federal Sentencing Guidelines as mandatory (in contravention of this Court’s decision in United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005)), the Fifth Circuit misapplied this Court’s decision in United States v. Dominguez Benitez, 542 U.S. 74 (2004), by requiring more than a “reasonable probability” that this error affected a defendant’s sentence. At a minimum, this Court should hold this petition pending the Court’s resolution of a related issue in Washington v. Recuenco, No. 05-83, cert. granted, 126 S. Ct. 478 (2005).

A. Introduction.

In Petitioner’s case, the Fifth Circuit found plain error under this Court’s decision in Booker,<sup>3</sup> but then held that the plain Booker error did not require reversal of the sentence. Because the Fifth Circuit law supporting that conclusion is erroneous, and because the question of the proper standards for performing plain-error review of Booker errors is an important one that has divided the federal circuits, this Court should grant certiorari in this case to resolve that question (or at least hold this petition pending the Court’s resolution of a related issue in

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<sup>3</sup> In applying the first two prongs of plain-error review, the Fifth Circuit has, like every other circuit, recognized that “[i]t is clear after Booker that application of the Guidelines in their mandatory form constitutes error that is plain.” United States v. Valenzuela-Quevedo, 407 F.3d 728, 733 (5th Cir.) (citations omitted), cert. denied, 126 S. Ct. 267 (2005); accord, e.g., United States v. White, 405 F.3d 208, 216-17 (4th Cir. 2005), pet. for cert. filed (Oct. 13, 2005) (No. 05-6981); United States v. Gonzalez-Huerta, 403 F.3d 727, 732 (10th Cir.) (en banc), cert. denied, 126 S. Ct. 495 (2005).

Washington v. Recuenco, No. 05-83, cert. granted, 126 S. Ct. 478 (2005)), for the reasons set forth below.

B. The Plain-Error Rule: General Principles.

"Federal Rule of Criminal Procedure 52(b), which governs on appeal from criminal proceedings, provides a court of appeals a limited power to correct errors that were forfeited because not timely raised in the district court."<sup>4</sup> United States v. Olano, 507 U.S. 725, 731 (1993). As this Court pointed out in Olano, there are four conditions to be satisfied before a forfeited error may be corrected on appeal: (1) there must be an error; (2) that is plain; (3) that affected the defendant's substantial rights; and (4) that seriously affects the fairness, integrity or public reputation of judicial proceedings. Id. at 732-36. The defendant bears the burden of showing that the error was prejudicial. Id.

In Olano, this Court declined to "decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial.'" Id. at 735 (citation omitted). The Court suggested that "[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed. Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." Id.

In United States v. Dominguez Benitez, 542 U.S. 74 (2004), the

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<sup>4</sup> Rule 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b).

Court for the first time "formulate[d] the standard for determining whether a defendant has shown, as the plain-error standard requires, an effect on his substantial rights." Id. at 80. Particularly, the Court held that, in order to satisfy the third prong of plain error review (namely, whether the error in question affected the defendant's substantial rights), a defendant need only show a reasonable probability that, but for the error in his case, the result of the proceeding would have been different. See id. at 81-82. Moreover, said the Court, "[t]he reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." Id. at 83 n.9 (citing Kyles v. Whitley, 514 U.S. 419, 434 (1995)).

C. Because the Error of Treating the Federal Sentencing Guidelines Is a Structural Error, That Error Necessarily Affects a Defendant's Substantial Rights, and the Third Prong of Plain-Error Review Is Satisfied. Because This Court's Forthcoming Decision in Recuenco May Shed Light on When Sentencing Error Is Structural, This Court Should Hold This Petition Pending Its Decision in Recuenco.

First recognized in Arizona v. Fulminante, 499 U.S. 279 (1991), "structural error" is, in the context presented here,

a defect affecting the framework within which the [sentencing] proceeds, rather than simply an error in the [sentencing] process itself. Such errors infect the entire [sentencing] process, and necessarily render a [sentencing] fundamentally unfair. Put another way, these errors deprive defendants of basic protections without which . . . no criminal punishment can be regarded as fundamentally fair.

Neder v. United States, 527 U.S. 1, 8-9 (1999) (internal quotation marks and citations omitted).

The error of applying the Federal Sentencing Guidelines as mandatory, in contravention of Booker, is clearly a structural error because it affected the entire framework within which pre-Booker federal defendants' sentencings proceeded. The entire sentencing process, including the advocacy of defense, was focused narrowly on the Guidelines, rather than on the broader vistas of sentencing opened up by the Booker decision. See, e.g., United States v. Ranum, 353 F. Supp. 2d 984, 985-87 (E.D. Wis. 2005) (discussing the much broader scope of a sentencing court's inquiry post-Booker). Had these defendants known of the post-Booker discretion available to the sentencing court, their sentencing presentations and sentencing litigation strategies would undoubtedly have been different. And, even more to the point, the sentencing judges in these cases did not exercise - because they did not know they could - the broader sentencing discretion conferred by Booker,<sup>5</sup> because the judge erroneously believed his

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<sup>5</sup> An example of the broader sentencing discretion available post-Booker is found in United States District Judge Paul Cassell's opinion in United States v. Croxford, 324 F. Supp. 2d 1230 (D. Utah), reconsideration denied, 324 F. Supp. 2d 1255 (D. Utah 2004). In Croxford, Judge Cassell, foreshadowing the decision in Booker, held that the rule of Blakely applied to the Sentencing Guidelines and that the remedy was to sentence without the constraints of the Sentencing Guidelines. Judge Cassell noted that this was a very different exercise from sentencing under the Guidelines because

the court might also now be free to consider facts that the Guidelines would make irrelevant. In this case, for example, it appears based on a detailed, court-ordered psychiatric report that the defendant was sexually abused as a child on numerous occasions. Under the Guidelines, such facts are "ordinarily not relevant" in determining whether to depart from the guideline range. Because the court is apparently now more free to consider this

hands were tied under the Sentencing Guidelines. It is impossible to know for certain what the judge might have done if freed of the constraints of mandatory Guidelines. For these reasons, the Booker error at issue here is structural.

Moreover, in addressing the substantial-rights prong of plain-error review in Olano, this Court noted that “[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome,” Olano, 507 U.S. at 735; and, by its citation of Fulminante, 499 U.S. at 310, the Court signaled that this “special category of forfeited errors” referred to the concept of “structural error” introduced in Fulminante.<sup>6</sup> See Olano, 507 U.S. at 735. A structural error therefore should be deemed to affect a defendant’s substantial rights (and thus also to satisfy the third prong of plain-error review) without the need for any showing of harm or prejudice.

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evidence, . . . the court has taken the evidence into consideration by slightly reducing the defendant’s sentence.

Id. at 1247-48 (footnote omitted). Thus, notwithstanding the fact that the Guidelines would have required a sentence between 151 months’ imprisonment and 188 months’ imprisonment, Judge Cassell imposed a slightly-below-Guidelines sentence of 148 months’ imprisonment. Id. at 1249. See also Ranum, 353 F. Supp.2d at 989-91 (detailed examination of § 3553(a) sentencing factors resulting a sentence below that suggested by the Sentencing Guidelines).

<sup>6</sup> In Johnson v. United States, 520 U.S. 461 (1997), this Court was presented with an argument that an error was “structural” and thus satisfied the third prong of Olano plain-error review, but the Court ultimately found it unnecessary to resolve that argument because it concluded that the petitioner there could not satisfy the **fourth** prong of plain error review. See Johnson, 520 U.S. at 468-70.

A case now pending on this Court's docket may shed significant light on the question whether the Booker error at issue here is a structural error. On October 17, 2005, this Court granted certiorari in Washington v. Recuenco, No. 05-83, cert. granted, 126 S. Ct. 478 (2005). At issue in Recuenco is whether the error identified in Blakely v. Washington, 542 U.S. 296 (2004) - namely, the increase of a sentencing on the basis of a judicial finding, rather than a jury finding or defendant admission - is a structural error, insusceptible of harmless error analysis; or whether, rather, it may properly be analyzed under constitutional harmless-error analysis. See Pet. Cert., Washington v. Recuenco, No. 05-83, at I & 6-18.

Inasmuch as Recuenco involves a Sixth Amendment type of Blakely/Booker error, Recuenco will not directly govern whether the non-Sixth Amendment error at issue here is structural or not. Nevertheless, it seems likely that the Court's decision in Recuenco will have ramifications for the question presented by this case. In Recuenco, this Court will, for the first time, address what is necessary for an error to be considered structural in the **sentencing** process (as opposed to the trial, or pretrial, process). Accordingly, this Court should, at a minimum, hold this case pending the forthcoming decision in Recuenco.

D. Even If the Booker Error at Issue in This Case Is Not a Structural Error, the Fifth Circuit Has Nevertheless Still Misapplied the Reasonable-Probability Standard of *Dominquez Benitez*.

Even if the type of Booker error at issue in this case is not structural, the Fifth Circuit has, nevertheless, still seriously deviated from this Court's teachings in Dominquez Benitez in applying the third prong of plain-error review to Booker error. This deviation likewise deserves this Court's review.

In its very first published decision on plain Booker error, United States v. Mares, 402 F.3d 511, 521-22 (5th Cir.), cert. denied, 126 S. Ct. 43 (2005), the Fifth Circuit adopted the third-prong approach of the Eleventh Circuit in United States v. Rodriguez, 398 F.3d 1291 (11th Cir.), reh'g en banc denied, 406 F.3d 1261 (11th Cir. Apr. 19, 2005) (en banc), cert. denied, 125 S. Ct. 2935 (2005).<sup>7</sup> Both Rodriguez and Mares began, quite properly, by acknowledging that this Court's decision in Dominquez Benitez supplied the governing standard. See Mares, 402 F.3d at 521; Rodriguez, 398 F.3d at 1299.

At this point, however, the Eleventh Circuit - and hence also the Fifth Circuit - seriously diverged from Dominquez Benitez. Invoking this Court's decision in Jones v. United States, 527 U.S. 373 (1999), the Eleventh Circuit held that

the burden truly is on the defendant to show that the error actually did make a difference: if it is equally plausible that the error worked in favor of the defense,

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<sup>7</sup> In rejecting petitioner's arguments on appeal, the Fifth Circuit relied on its prior decision in Mares. See Appendix A, at 35-37.

the defendant loses; if the effect of the error is uncertain so that we do not know which, if either, side it helped[,] the defendant loses.

Rodriguez, 398 F.3d at 1300; see also Mares, 402 F.3d at 521 (quoting and agreeing with this passage).

The statement that "if it is equally plausible that the error worked in favor of the defense, the defendant loses" makes it pellucidly clear that the Eleventh Circuit and the Fifth Circuit are in fact applying a preponderance-of-the-evidence standard - in direct contravention of this Court's holding that "[t]he reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." Dominquez Benitez, 542 U.S. at 83 n.9. If any doubt remained that this was true, it was recently cleared up by the Fifth Circuit, which plainly stated that "[i]n Mares, this court indicated that the defendant had to show **more than an equal probability of prejudice.**" United States v. Martinez-Lugo, 411 F.3d 597, 601 (5th Cir.) (citing Mares, 402 F.3d at 521) (emphasis added), cert. denied, 126 S. Ct. 464 (2005).

This patently incorrect articulation of Dominquez Benitez's reasonable-probability standard is, in and of itself, reason for this Court to grant certiorari. Cf. Sup. Ct. R. 10(c) (stating that grant of certiorari may be appropriate where "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court"). But, as bad as that misarticulation of the reasonable-probability

standard is, the indications are that the Fifth Circuit is compounding the error by requiring an even greater showing than a preponderance of the evidence.

Indeed, the Fifth Circuit's case law seems to demand something approaching **virtual certainty** that the sentence would be different before it will reverse for a plain Booker error. In its first published decision reversing for plain Booker error, the Fifth Circuit held that, in order to meet the third prong of plain-error review,

[a defendant] must establish that the sentencing Court's use of a mandatory rather than an advisory Guidelines scheme actually affected the sentence. **To carry this burden the appellant must ordinarily point to statements in the record by the sentencing judge demonstrating a likelihood that the judge sentencing under an advisory scheme rather than a mandatory one would have reached a significantly different result.**

United States v. Pennell, 409 F.3d 240, 245 (5th Cir. 2005) (emphasis added). Under the Fifth Circuit's application of the third prong, only statements by the sentencing judge will suffice to meet a defendant's third-prong burden. Other indicators - such as the imposition of the minimum sentence under the Guidelines or the presence of mitigating factors for which the Guidelines either discouraged, or forbade outright, downward departure - will not do.<sup>8</sup>

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<sup>8</sup> See, e.g., United States v. Bringier, 405 F.3d 310, 317 n.4 (5th Cir.) (holding that "the fact that the sentencing judge imposed the minimum sentence under the Guideline range . . . alone is no indication that the judge would have reached a different conclusion under an advisory scheme") (citation omitted), cert. denied, 126 S. Ct. 264 (2005); United States v. Hernandez-Gonzalez, 405 F.3d 260, 262 (5th Cir. 2005) (on petition for rehearing)

Indeed, not just any statements will do for this purpose either. A district court's comments that a sentence is "harsh," that it "is the lowest sentence that I could give you," or that the court "s[aw] no reason to sentence you beyond the minimum," do not suffice to carry a defendant's burden. See Bringier, 405 F.3d at 317 n.4. Instead, it appears that a defendant can only meet his burden where "the sentencing judge [ ] lament[s] over the sentence he imposed, . . . [or] state[s] that the sentence is '**more** than appropriate' or '**too** severe.'" Id. (emphasis in original).

The problem with this approach has been ably explained by Judge Wardlaw of the United States Court of Appeals for the Ninth Circuit:

The Eleventh Circuit asked the right question in Rodriguez in determining whether Booker error affected Rodriguez's substantial rights: whether there is a reasonable probability that there would have been a different sentencing disposition had the sentencing judge been aware that the Guidelines were advisory. Nonetheless, it came up with the wrong answer, holding that, because in most cases the answer will be "we don't know," except in extraordinary circumstances, a defendant will not be able to meet his burden of showing that his substantial rights have been affected. The Dominquez Benitez prejudice test is not limited to what the district judge said on the record; rather, [the appellate court's] decision must be "informed by the entire record."

United States v. Ameline, 409 F.3d 1073, 1099 (9th Cir. 2005) (en

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(third prong not satisfied even though defendant received the Guidelines minimum **and** had mitigating factors for which the Guidelines either discouraged, or forbade outright, downward departure; court noted that "[defendant] points to no remarks made by the sentencing judge that raise a reasonable probability that the judge would have imposed a different sentence under an advisory scheme"), cert. denied, 126 S. Ct. 202 (2005).

banc) (Wardlaw, J., concurring in part and dissenting in part) (citations omitted). "Under the Eleventh Circuit's approach," however, "a pre-Booker defendant's right to resentencing depends largely upon whether the district court stated on the record that it felt constrained by the Guidelines or that it would have sentenced the defendant to a lower sentence if the Guidelines were advisory rather than mandatory." Id. (citations omitted).

As Judge Wardlaw has aptly noted, "Although explicit statements of frustration or similar sentiments in the record would facilitate a finding of prejudice, such statements by the sentencing judge are not required to show prejudice." Id. "To the contrary: . . . it would be unreasonable to require defendants to point to criticism of, or disagreement with, the Guidelines to establish a violation of their substantial rights." Id. at 1099-1100. In sum, said Judge Wardlaw, the approach applied by the Eleventh Circuit and the Fifth Circuit "imposes a fundamentally unfair burden on defendants by requiring a defendant to demonstrate certainty in a different outcome under the new sentencing scheme to gain the benefit of a constitutionally sound sentencing process." Id. at 1100; see also United States v. Barnett, 398 F.3d 516, 528 (6th Cir.) (referring to this burden as "too exacting a burden"), cert. dismissed, 126 S. Ct. 33 (2005).

Other courts applying the Dominguez Benitez rubric to plain Booker errors are in agreement with these principles. The First Circuit has noted that such remarks should not be required because "a district judge may well not have expressed his or her

reservations [about a guidelines sentence] because the guidelines made them hopeless . . . ." United States v. Heldeman, 402 F.3d 220, 224 (1st Cir. 2005). For this reason, "[a] district court's expression that he would have sentenced a defendant more favorably if the Guidelines were not mandatory [should] certainly not [be] the only vehicle for a remand. The existence of prejudice should not turn on how vocal the district judge was." United States v. Antonakopoulos, 399 F.3d 68, 81 (1st Cir. 2005). Instead, under a proper application of the Dominquez Benitez standard - that is, "informed by the **entire** record," Dominquez Benitez, 542 U.S. at 83 (emphasis added) - remand may also be appropriate where there are "mitigating circumstances that existed at the time of the original sentence but which were not available for consideration under the mandatory Guidelines regime," Antonakopoulos, 399 F.3d at 81 (citation omitted), either because the circumstances were ones for which departure was forbidden or because the circumstances, though mitigating, did not take the case outside the "heartland" defined by the applicable Guidelines.

For the foregoing reasons, the Fifth Circuit's articulation and application of the third prong of plain-error review in Mares are in direct conflict with this Court's decision in Dominquez Benitez. Moreover, quite apart from the specific context presented here, the proper application of the plain-error rule is a frequent and recurring problem in federal criminal practice generally. This Court should therefore grant certiorari to overrule Mares (and Rodriguez, from which it derives) and to clarify and reaffirm the

"reasonable-probability" standard of Dominquez Benitez.

E. The Circuits Are Deeply Divided Respecting the Proper Application of the Third Prong of Plain-Error Review to Plain Booker Error.

There is another reason why this Court should grant certiorari in this case, namely that the federal courts of appeals are deeply divided as to the proper application of the third prong of plain-error review in the context of Booker error. The First and the Eighth Circuits agree with the Fifth and the Eleventh Circuits that "classic" plain-error analysis should apply to plain Booker errors,<sup>9</sup> although the First Circuit has tempered its plain error analysis somewhat by "invit[ing] proffers by the defendant as to what the defendant might have said if the guidelines had been advisory at the time."<sup>10</sup> The Tenth Circuit, sitting en banc, has likewise endorsed classic plain-error third-prong analysis,<sup>11</sup> although that court ultimately resolved that particular case under the fourth prong of plain-error review.<sup>12</sup> Finally, the Fourth Circuit has also adopted this approach for non-Sixth Amendment

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<sup>9</sup> See Antonakopoulos, 399 F.3d at 75 & 77-82 (1st Cir.); United States v. Pirani, 406 F.3d 543, 547 (8th Cir.) (en banc) (explicitly following decisions of the First Circuit [Antonakopoulos], Fifth Circuit [Mares], and Eleventh Circuit [Rodriguez]), cert. denied, 126 S. Ct. 266 (2005).

<sup>10</sup> Heldeman, 402 F.3d at 224. As noted above, the First Circuit is also more generous as to the types of evidence that will establish the "reasonable probability" required by Dominquez Benitez.

<sup>11</sup> See Gonzalez-Huerta, 403 F.3d at 736.

<sup>12</sup> See id. at 736-39.

Booker error (i.e., the error of sentencing under the belief that the Guidelines were mandatory, as opposed to the Sixth Amendment error of enhancing the Guidelines range based on facts neither found by a jury nor admitted by the defendant),<sup>13</sup> although it has adopted essentially a per se reversal policy for Sixth Amendment-type Booker errors.<sup>14</sup>

Like the Fourth Circuit, the Third and Sixth Circuits will, in the case of Sixth Amendment-type Booker errors, reverse whenever the sentence actually imposed exceeds the Guidelines range established by the jury verdict or the facts admitted by the defendant. See United States v. Davis, 407 F.3d 162, 164 (3d Cir. 2005); United States v. Oliver, 397 F.3d 369, 379-381 (6th Cir. 2005). In the case of non-Sixth Amendment Booker errors, however, the Third and Sixth Circuits apply a rebuttable presumption of prejudice, that is, presuming prejudice from the application of mandatory Guidelines unless the government affirmatively rebuts the presumption by showing that the defendant would not have received a lower sentence under an advisory Guidelines scheme. See Davis, 407 F.3d at 165 (3d Cir.); Barnett, 398 F.3d at 527-29 (6th Cir.); see generally Olano, 507 U.S. at 735 (alluding to the existence of a class of "errors that should be presumed prejudicial if the

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<sup>13</sup> See White, 405 F.3d at 217-25.

<sup>14</sup> For Sixth Amendment errors, the Fourth Circuit will reverse whenever the sentence actually imposed exceeds the Guidelines range established by the jury verdict or the facts admitted by the defendant. See United States v. Hughes, 401 F.3d 540, 548-56 (4th Cir. 2005).

defendant cannot make a specific showing of prejudice"). Other federal appellate jurists have also endorsed this sort of presumption of prejudice.<sup>15</sup>

Finally, the Second, Seventh, Ninth, and District of Columbia Circuits have adopted a "quick look" approach. These circuits, instead of attempting to guess from the record on appeal whether the district court would have imposed a lower sentence under the post-Booker advisory Guidelines regime, simply ask the district court whether it would have imposed a lower sentence. If the answer is yes, then resentencing is ordered.<sup>16</sup> (These courts have also ordered that, before the district court answers the question,

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<sup>15</sup> See Pirani, 406 F.3d at 563-66 (Bye, J., concurring in part and dissenting in part); Gonzalez-Huerta, 403 F.3d at 753-56 (Briscoe, J., concurring in part and dissenting in part) (would apply presumption of prejudice); United States v. Serrano-Beauvaix, 400 F.3d 50, 57-62 (1st Cir.) (Lipez, J., concurring) (while acknowledging argument was foreclosed by circuit precedent, would apply a presumption of prejudice similar to that in Barnett), cert. denied, 126 S. Ct. 106 (2005) & 126 S. Ct. 122 (2005).

<sup>16</sup> See United States v. Ameline, 409 F.3d 1073, 1074-75 & 1078-81 (9th Cir. 2005) (en banc); United States v. Coles, 403 F.3d 764, 769-71 (D.C. Cir. 2005); United States v. Paladino, 401 F.3d 471, 483-85 (7th Cir. 2005); United States v. Crosby, 397 F.3d 103, 117-18 (2d Cir. 2005).

There is, however, a slight difference in how these courts apply the "quick look" approach. The Second and Ninth Circuits' remand orders allow the district court to vacate the sentence and to resentence, upon the district court's determination that it would have imposed a different sentence under an advisory Guidelines regime. See Crosby, 397 F.3d at 117-18; Ameline, 409 F.3d at 1075 (explicitly adopting the Crosby approach). The Seventh and District of Columbia Circuits, in contrast, retain jurisdiction and order only a limited remand for the district court to inform whether it would have imposed a different sentence; and, if the answer is affirmative, those appellate courts then vacate the sentence and remand for resentencing. See Paladino, 401 F.3d at 483-85; Coles, 403 F.3d at 770-71.

it "should obtain the views of counsel, at least in writing," though the defendant need not be present.<sup>17</sup>)

In the words of Judge Posner, these courts believe that, "[g]iven the alternative of simply asking the district judge to tell us whether he would have given a different sentence, and thus dispelling the epistemic fog," there is no reason "to condemn some unknown fraction of criminal defendants to serve an illegal sentence." Paladino, 401 F.3d at 484. Other federal appellate judges have likewise expressed support for this approach. See Pirani, 406 F.3d at 562 (Morris Sheppard Arnold, J., dissenting); Gonzalez-Huerta, 403 F.3d at 762-63 (Lucero, J., dissenting).

As is evident, the circuits are deeply divided respecting the proper application of plain-error doctrine with respect to Booker errors. This is another reason why this Court should grant certiorari in this case.

F. Conclusion.

The problem of the proper application of the plain-error rule to "pipeline" Booker errors (*i.e.*, those arising in cases where the defendants were sentenced before Booker) may seem, at first blush, to be an ephemeral problem that does not justify this Court's review. Like many first impressions, however, that first blush is wrong, for two reasons.

First, even if these questions were limited to "pipeline"

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<sup>17</sup> Crosby, 397 F.3d at 120; accord Ameline, 409 F.3d at 1085; Coles, 403 F.3d at 770; Paladino, 401 F.3d at 484.

Booker cases, these questions would merit this Court's attention. Even in this narrow context, the questions presented here affect the thousands, if not tens of thousands, of persons whose federal criminal cases were pending on direct review when Booker was handed down. Defendants in the Fifth Circuit and other circuits that have adopted a similar approach to Booker error are being deprived of the very real opportunity for a lower prison sentence that defendants in the Second, Third, Fourth, Sixth, Seventh, Ninth, and District of Columbia Circuits have received. As Tenth Circuit Judge Lucero has noted: "This wide ranging circuit split results in the disparate treatment of criminal defendants throughout the nation. Such uneven administration of justice cries out for a uniform declaration of policy by the Supreme Court." Gonzalez-Huerta, 403 F.3d at 763 (Lucero, J., dissenting); see also United States v. Mooney, 425 F.3d 1093, 1105 (8th Cir. 2005) (en banc) (Bright, J., dissenting, joined by Lay, J.) ("urg[ing] the Supreme Court to resolve the circuits' split on th[e] issue [of plain-error review of Booker errors], to eliminate the geographic crazyquilt by which many criminal defendants, sentenced for similar conduct and crimes, receive dissimilar appellate treatment under Booker and, in many cases, disparate sentences").

But the questions presented here have ramifications over and beyond the Booker "pipeline" context in which they arise. Broadly considered, these questions raise fundamental issues regarding the administration of the plain-error rule of Fed. R. Crim. P. 52(b) (including the concept of "presumed prejudice" mentioned in Olano)

that transcend the context here presented and have recurring importance in federal appellate practice. For all of these reasons, this Court should grant certiorari in this case.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse the judgment of the Fifth Circuit.

Date:  
December 29, 2005.

Respectfully submitted,

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